STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

LALE ROBERTS and JOAN ROBERTS,

Plaintiffs-Appellees,

vs.

KATHRYN SALMI, L.P.C., an individual, d/b/a SALMI CHRISTIAN COUNSELING,

Defendant-Appellant.
_____/

Supreme Court No.: 150919

Court of Appeals No.: 316068

Houghton County Circuit Court
Case No.: 12-15075-NH

BRIEF ON APPEAL FOR DEFENDANT-APPELLANT
KATHRYN SALMI, L.P.C., D/B/A SALMI CHRISTIAN COUNSELING

*****ORAL ARGUMENT REQUESTED*****

CERTIFICATE OF SERVICE

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STATEMENT OF QUESTION PRESENTED

WHETHER A MENTAL HEALTH PROFESSIONAL HAS A DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED BY THE MENTAL HEALTH PROFESSIONAL'S USE OF TECHNIQUES THAT CAUSE A PATIENT TO HAVE FALSE MEMORIES OF SEXUAL ABUSE?

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STATEMENT OF FACTS

Defendant Kathryn Salmi, LPC, d/b/a Salmi Christian Counseling, appeals by leave granted by order of this Court dated September 16, 2015 (Apx 365a), from the published Court of Appeals' opinion of December 18, 2014 (Apx 14a). The Court of Appeals reversed the grant of summary disposition by Houghton County Circuit Judge Thomas L. Solka on January 18, 2013, after a hearing held on January 10, 2013 (1/18/13 order, Apx 10a; TR 1/10/13, Apx 286a).

Defendant Kathryn Salmi, a licensed professional counselor, submits that summary disposition should be granted in this medical malpractice action on the basis that she owed no duty to the plaintiffs with respect to claims of negligence toward their daughter, "K," under either the common law or under MCL 330.1946, and because the imposition of such a duty under the circumstances presented here is against public policy. Defendant also submits that summary disposition should be granted because Michigan has not recognized a cause of action by family members for emotional distress damages arising out of care and treatment provided to others, or, alternatively, because plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this state. The facts relevant to these issues are set forth below and, except as otherwise indicated, are based solely upon the allegations in the complaint[1].

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[1] Defendant does not concede the accuracy of these facts, but will utilize these facts for purposes of this appeal only.

Underlying Facts

This is a medical malpractice action in which plaintiffs allege that defendant Kathryn Salmi was negligent in improperly implanting or reinforcing false memories of physical and sexual abuse in the mind of their daughter, identified in the complaint as "K," which plaintiffs claim resulted in their own emotional distress, lost wages and medical expenses.

As set forth in the lower court record, "K's" date of birth is July 21, 1991 (TR 1/10/13, Apx 286). Plaintiffs sent their daughter "K" to attend counseling sessions with defendant Kathryn Salmi, a licensed professional counselor, in early July 2009, for the purpose of addressing mental and psychological issues stemming from an assault at the hands of a George Coppler (complaint, ¶¶ 10-11, Apx 33a). Plaintiffs allege that Ms. Salmi engaged in a therapy known as Recovered Memory Therapy with "K," which plaintiffs contend resulted in "K" claiming that she began to remember things that she "is adamant of actually having happened to her," including purportedly false allegations of severe physical and sexual abuse by her father and mother (*Id.*, ¶¶ 12-16, 19, Apx 34a). Plaintiffs attended a joint counseling session with "K" on July 14, 2009, at which time "K" confronted plaintiffs with her accusations of "severe physical and sexual abuses" (*Id.*, ¶¶ 14-16, Apx 34a).

Ms. Salmi reported allegations of abuse to Child Protective Services on September 15, 2009, which, along with the Michigan State Police, investigated both plaintiffs (complaint, ¶¶ 17-18, Apx 34a). Both investigations were eventually dropped and the Baraga County Prosecuting Attorney's office declined to prosecute (*Id.*, ¶ 20, Apx 34a).

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Plaintiffs allege that "K" has severed all ties with plaintiffs and has made further complaints to police and in the community against plaintiffs (*Id.*, ¶ 21, Apx 34a). Plaintiffs allege that, as a result of the negligence of Ms. Salmi, they "have and will suffer damages" including pain, suffering and disability; medical, psychiatric and psychological expenses; lost wages; loss of enjoyment of life; as well as humiliation, mortification, and embarrassment; anxiety (*Id.*, ¶ 22, Apx 35a).

In their single-count complaint filed January 9, 2012, plaintiffs allege "Negligence or Malpractice" by Ms. Salmi in failing to properly diagnose and treat their daughter (*Id.*, Count I, Apx 35a). Plaintiffs allege that Ms. Salmi improperly introduced religious themes and activated these themes into therapy; improperly implanted or reinforced false memories of physical and sexual abuse in "K's" mind by use of hypnosis, age regression and other psychotherapy techniques[2]; failed to disclose to "K" and to plaintiffs when "K" was still a minor of the availability of other forms of treatment as well as the risks and benefits of the treatment used by Ms. Salmi; and failed "to properly handle the transference and counter-transference existing in the therapy relationship" (*Id.*, ¶ 27, Apx 36a).

At the time defendant filed the answer to plaintiffs' complaint, defense counsel sent plaintiffs' counsel correspondence requesting that plaintiffs dismiss the case on the basis that plaintiffs have failed to state a claim upon which relief can be granted under Michigan law (4/19/12 correspondence, attached below as Exhibit A to defendant's

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[2] Although the allegations in the complaint are assumed true for purposes of appeal, as set forth in the affidavit of meritorious defense signed by Ms. Salmi, Ms. Salmi does not use Repressed or Recovered Memory Therapy as plaintiffs suggest, nor has she been trained in hypnosis and does not employ that technique in her practice (affidavit of meritorious defense, Apx 39a-42a).

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motion for protective order, Apx 49a). Plaintiffs' counsel instead scheduled the deposition of "K" for Friday, May 4, 2012 (notice and subpoena, attached below as Exhibit B to defendant's motion for protective order, Apx 51a-52a).

Defendant thereafter filed an emergency motion for a protective order, seeking to adjourn the deposition so as to allow defendant to file, and the court to decide, a motion for summary disposition (motion for protective order, Apx 43a). In the motion, defense counsel submitted that she has spoken with "K" by telephone regarding the deposition, and "K" was "extremely agitated" about having to appear for a deposition in a case brought by her birth parents, and "K" anticipated that the deposition would be "traumatic" (*Id.*, ¶ 6, p 2, Apx 44a). Defense counsel further submitted that "K" had indicated that she has cut off all contact with the plaintiffs and has changed her name, and she "absolutely abhors the thought that she might be forced to share any personal information with her birth parents" (*Id.*).

"K" filed two letters from her treating therapists in support of the motion, wherein "K's" treaters indicated that the deposition was not in the best interest of their patient and could result in psychological trauma (5/3/12 letters, Apx 151a-152a).

Plaintiffs filed a response, arguing that "K's" testimony is "the key" to obtaining the medical records necessary to pursue their claim (response to motion for protective order, ¶ 7, p 2, Apx 56a).

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Following a hearing held on May 3, 2012[3], the trial court entered an order granting the motion for a protective order, adjourning "K's" deposition "until further order of the court" (5/3/12 order, Apx 65a).

Motion For Summary Disposition And Trial Court's Decision

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8), seeking dismissal of all of plaintiffs' claims (motion for summary disposition, Apx 66a). In the motion, defendant submitted that dismissal is proper where plaintiff cannot come forward with admissible evidence to establish that the treatment provided by Ms. Salmi was negligent where the counselor-client privilege barred plaintiffs any access to "K's" records (*Id.*). Additionally, defendant submitted that plaintiffs' claim fails as a matter of law where Ms. Salmi owed no duty to the plaintiffs with respect to claims of negligence toward "K," and, alternatively, Michigan has not and should not recognize a cause of action by family members for emotional distress damages arising out of care and treatment provided to others (*Id.*). Finally, defendant submitted that plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this State (*Id.*).

Plaintiffs responded to the motion by arguing that they seek damages relating to the purportedly negligent treatment provided by Ms. Salmi to their daughter "K," including being falsely labeled as child molesters and the "stigma that such a label carries with it" (plaintiff's response, pp 1-2, Apx 159a-160a). Plaintiffs argued that it was not clear whether "K" will assert the counselor-client privilege, although counsel

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[3] Plaintiffs, the appellants in the Court of Appeals, did not order the transcript of the hearing on defendant's motion for protective order as required by MCR 7.210(B)(1)(a).

conceded that the court entered a protective order preventing "K's" deposition in this matter (*Id.*, p 4, Apx 162a).

Defendant also filed a reply brief, wherein defendant submitted that plaintiffs cannot establish that "K's" memories are false, which is an essential element of plaintiffs' claim (reply brief, Apx 273a).

The hearing on defendant's motion occurred before Houghton County Circuit Court Judge Thomas L. Solka on January 10, 2013 (TR 1/10/13, Apx 286a). At the hearing, the court granted defendant's motion on the ground of the absence of a legal duty owed to the parents under Michigan law (*Id.*, pp 38-39, Apx 323a-324a). The court held that whether this cause of action should be allowed in this State is a question of policy, which is better left to the Legislature or the appellate courts of this State (*Id.*, pp 39-40, Apx 324a-325a).

The order granting defendant's motion for summary disposition was entered on January 18, 2013 (1/18/13 order, Apx 10a).

Plaintiffs filed a motion for reconsideration on February 7, 2013, to which defendant filed a response (motion for reconsideration, Apx 328a; defendant's response to motion for reconsideration, Apx 339a). Plaintiffs also filed a reply brief (reply in support of motion for reconsideration, Apx 346a). The trial court issued an opinion and order denying plaintiff's motion for reconsideration on April 15, 2013 (4/15/13 order, Apx 12a).

Court Of Appeals' Decision

Plaintiffs filed a claim of appeal in the Court of Appeals on May 6, 2013 (claim of appeal, Apx 354a). After briefing and oral argument, the Court reversed the grant of

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summary disposition in a published opinion decided December 18, 2014 (Judges William B. Murphy, Michael J. Kelly, with David H. Sawyer dissenting). The Court held that Michigan recognizes a duty of care to third parties who might foreseeably be harmed by a mental health professional's use of allegedly improper techniques that cause his or her patient to have false memories of sexual abuse. *Roberts v Salmi*, 308 Mich App 605, 609; 866 NW2d 460 (2014) (Apx 14a). The Court held that the relationship between a mental health professional and his or her patient's parents weighs in favor of imposing a limited duty because it is "entirely foreseeable" that the use of suggestive techniques to recover memories might result in the creation of false memories of abuse by the patient's parents. *Id.* at 615-616, 619, 628. The Court further held that a balancing of policy considerations also weighs in favor or recognizing a limited duty by a mental health professional to his or her patient's parents to ensure that the health professional's treatment does not give rise to false memories of childhood sexual abuse, concluding that recognizing a limited duty of care to third parties would not unduly burden a mental health professional's ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. *Id.* at 626-627.

Finally, the Court rejected defendant's remaining arguments, holding that whether plaintiffs will be unable to secure the evidence necessary to prove their claim as a result of the counselor-client privilege is premature because the parties have not yet had an adequate opportunity to conduct discovery, and holding that merely because plaintiffs' claim involves to some extent the alienation of "K's" affections does not transform plaintiffs' claim into one for alienation of affection. *Id.* at 632-633.

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Judge Sawyer dissented from the majority's opinion, holding that the issue of whether a duty should be recognized under the circumstances of this case is best left to the Legislature. *Id.* at 634-636.

This Court granted leave to appeal on September 16, 2015, limited to a single issue:

> The parties shall address whether a mental health professional has a duty of care to third parties who might foreseeably be harmed by the mental health professional's use of techniques that cause a patient to have false memories of sexual abuse. [9/16/15 order, Apx 365a].

Defendant submits this brief in support of her position that the Court of Appeals erred in reversing the trial court's grant of summary disposition. Defendant respectfully requests that this Honorable Court reverse the Court of Appeals' decision reversing the trial court.

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STANDARD OF REVIEW

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* A motion under MCR 2.116(C)(8) is considered only on the pleadings and may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 119-120.

A trial court's ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(8) is reviewed de novo. *Id.* at 118.

ARGUMENT

A MENTAL HEALTH PROFESSIONAL DOES NOT HAVE A DUTY OF CARE TO THIRD PARTIES WHO FORESEEABLY MIGHT BE HARMED BY THE MENTAL HEALTH PROFESSIONAL'S USE OF TECHNIQUES THAT CAUSE A PATIENT TO HAVE FALSE MEMORIES OF SEXUAL ABUSE.

The Court of Appeals erred in extending the duty of care owed by a mental health professional to non-patient third parties, such that the mental health professional could be liable to the third parties in a malpractice action for allegedly causing his or her patient to have "false" memories of sexual abuse, thus creating a cause of action never before recognized in this state.

Contrary to the Court of Appeals' holding, the relationship between the non-patient plaintiffs and their daughter's counselor does not support imposition of a duty here. Cases from other jurisdictions, rejecting the invitation to create the exact cause of action allowed by the Court of Appeals here, reflect the judiciary's recognition that the societal interest in encouraging treatment of child abuse victims and maintaining the

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trust and confidence so essential to the psychotherapy relationship dictates against the imposition of a duty of care to third parties. The therapist's fear of liability to a parent (or other third party) would discourage therapists to explore the possibility that their patient was abused or to treat patients who were – or who believe they were – abused. Additionally, recognition of the cause of action necessarily requires intrusion into the especially confidential realm of the psychotherapeutic relationship and, as argued in this case, possible involuntary waiver of the therapist-patient privilege and violation of the patient's privacy rights. For the reasons set forth below, the problem of divided loyalties and the strong public interest in maintaining the confidential nature of counselor-client communications both weigh against imposing a duty of care toward non-patient third parties. Recognition of this cause of action is, at a minimum, for the Legislature.

Moreover, the Court of Appeals' recognition of this cause of action improperly extends the limited statutory duty owed by a mental health professional to warn or protect a non-patient third party under MCL 330.1946. Additionally, the Court of Appeals' recognition of a "limited" duty on behalf of non-patient third parties is inconsistent with the legal principle that parents have no independent claim for their own damages for their own emotional distress arising out of care and treatment provided to their children, and effectively revives a parent's claim for "alienation of affection," which has been statutorily abolished by MCL 600.2901.

A. Ms. Salmi Owed No Duty To The Non-Patient Plaintiffs Under The Common Law.

There can be no tort liability unless the defendant owed the plaintiff a duty. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). As a general rule, there is no duty that obligates one person to aid or protect another. *Id*. Generally, a

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duty may arise from a statute, a contractual relationship, or by operation of the common law. *Id.* at 660-661.

At common law, whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. *Id.* at 661. The ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing the duty. *Id.* As this Court recognized in *Buczkowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992):

> Duty is actually a "'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.'" *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); Prosser & Keeton, Torts (5th ed), § 53, p 356. "'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Id.,* p 358. See also *Friedman v Dozorc, supra,* and *Antcliff v State Employees Credit Union*, 414 Mich 624, 631; 327 NW2d 814 (1982). [*Buczkowski v McKay*, 441 at 100-101 (footnotes omitted)].

Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Hill*, 492 Mich at 661. This Court has recognized that, before a duty can be imposed, the most important factors to be considered are the relationship of the parties and the foreseeability of the harm. *Id.* If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors. *Id.*

A majority of states in which this same issue has been litigated have rejected a parent's cause of action against a mental health provider for allegedly negligent diagnosis and treatment of their child, resulting in "false" allegations of sexual abuse, based upon a lack of duty owed to the parent.

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In *Doe v McKay*, 183 Ill 2d 272; 700 NE2d 1018 (Ill, 1998), a case involving substantially similar facts as the instant action, the Supreme Court of Illinois rejected the plaintiff-parent's negligence claim based upon the lack of a legally recognized duty to the plaintiff, holding that the duty of due care owed by a health care professional runs only to the patient and not to third parties. In *Doe*, the plaintiff-parent brought an action against the psychologist who provided mental health treatment to his daughter, alleging that the psychologist's malpractice resulted in his daughter's false accusations of sexual abuse against the plaintiff. The court held that approval of plaintiff's cause of action would mean that mental health professionals could be subject to suit by any non-patient third party who is adversely affected by personal decisions perceived to be made by a patient in response to counseling. *Doe* at 1023. The court further held that any rule imposing a duty of care to third parties would potentially compromise the patient-therapist relationship and could also be inconsistent with the duty of confidentiality that every therapist owes to his or her patients. *Id.*

Specifically, the court in *Doe v McKay* held that the imposition of a duty under these circumstances would create an inherent conflict between the therapist and the client and place therapists in the precarious position where they would have to answer to competing demands from, and divide their loyalty between, their client and non-patient third parties who are adversely affected by decisions of the patient made in response to counseling. *Id.* at 1023. The Illinois Supreme Court in *Doe v McKay* held that these competing demands would have a destructive impact on the patient-therapist relationship, as follows:

> Concern about how a course of treatment might affect third parties could easily influence the way in which therapists treat their patients. Under a

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> rule imposing a duty of care to third parties, therapists would feel compelled to consider the possible effects of treatment choices on third parties and would have an incentive to compromise their treatment because of the threatened liability. This would be fundamentally inconsistent with the therapist's obligation to the patient. As one court has noted, "[D]octors should be free to recommend a course of treatment and act on the patient's response to the recommendation free from the possibility that someone other than the patient might complain in the future." *Lindgren v Moore*, 907 F Supp 1183, 1189 (ND Ill, 1995). Hoping to avoid liability to third parties, however, a therapist might instead find it necessary to deviate from the treatment the therapist would normally provide, to the patient's ultimate detriment. This would exact an intolerably high price from the patient-therapist relationship and would be destructive of that relationship. [*Doe v McKay*, 700 NE2d at 1023-1024].

Similarly, in *Trear v Sills*, 69 Cal App 4th 1341; 82 Cal Rptr 2d 281 (1999), the California Court of Appeals rejected a patient's parent's cause of action for professional malpractice against a therapist on the basis of the absence of any professional duty having been voluntarily assumed toward the parent. The court held that, because of the inherently adversarial nature of the therapeutic problems posed by possible childhood sexual abuse, the therapist's duty cannot extend to a possible abuser. *Trear* at 1349 (emphasis provided). The court observed that "defensive" therapy "practiced under the sword of liability if a therapist is wrong about a recovered memory can hardly serve the person to whom the therapist's duty unquestionably does run: the patient." *Id.* at 1355-1356.

In *Flanders v Cooper*, 1998 ME 28; 706 A2d 589 (1998), the Supreme Court of Maine similarly rejected a claim by the parent of a patient of the defendant, a licensed physical therapist who treated the plaintiff's daughter for temporomandibular joint syndrome and whom plaintiff alleged practiced beyond the scope of his license, for implanting false memories of sexual abuse perpetrated by the plaintiff into the mind of plaintiff's daughter. The court held that to recognize a cause of action by the parent

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would result in a health care professional, who suspected that a patient had been the victim of sexual abuse and who wanted to explore that possibility in treatment, having to consider the potential exposure to legal action by a third party who committed the abuse. *Flanders* at 591. The court held that it was not willing to sanction the intrusion on the professional-patient relationship, even in light of allegations of implantation of false memories of sexual abuse. *Id.*

See also *PT v Richard Hall Mental Health Care Center*, 364 NJ Super 561; 837 A2d 436 (2002) (holding that the parent of a child allegedly misdiagnosed as having been sexually abused could not maintain an action against the mental health professional who made the diagnosis where there was no relationship from which any duty owed to the parent might be derived); *Paulson v Sternlof*, 71 Okla BJ 3292; 15 P3d 981 (2000) (rejecting the plaintiff-parent's claim based upon the fact that the defendant psychologist owned no duty to plaintiff; "[w]ithout the necessary doctor-patient relationship, [defendant] simply had no duty to Appellant that, if breached, could be the basis of a malpractice claim"); *Bird v WCW*, 37 Tex Sup Ct J 329; 868 SW2d 767 (1994) (holding that a mental health professional owes no duty to a parent to not negligently misdiagnose a condition of the child); *Ramsey v Yavapai Family Advocacy Center*, 225 Ariz 132; 235 P3d 285, 293-295 (2010) (holding that mental health professional owes no duty to parent/third-party alleged abuser); *Althaus v Cohen*, 562 Pa 547; 756 A2d 1166, 1170-1171 (2000) (same); *Zamstein v Marvasti*, 240 Conn 549; 692 A2d 781, 787 (1997) (same).

As did the courts in each of these decisions, this Court should hold that plaintiffs have no malpractice claim against Ms. Salmi due to the lack of a legally recognized duty

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owed to the plaintiffs. Such a holding is consistent with appellate court decisions within this state holding that a physician's duty in a medical malpractice action runs solely to the physician's patient, not third party family members with whom there is no physician-patient relationship. See e.g. *Malik v Wm Beaumont Hospital,* 168 Mich App 159, 168-169; 423 NW2d 920 (1988) (no claim by brother who had undergone surgery to donate kidney to sister for negligence in the performance of surgery on the sister; no physician-patient relationship between the brother and the physician who performed sister's surgery, and thus no duty owed by the physician to the brother).

The Court of Appeals declined to follow the majority of other jurisdictions that have addressed this issue and ruled that such a duty does not exist, relying instead on cases from the minority of jurisdictions that have allowed the type of action. *Roberts v Salmi*, 308 Mich App at 628 n 9. These decisions, however, are not well reasoned and are inconsistent with the fundamental protections afforded to the therapist-client relationship under Michigan law.

B. The Only Duty Owed By A Mental Health Professional To Warn Or Protect A Non-Patient Third Party Under Michigan Law Is That Established By MCL 330.1946 And, As Such, The Court Of Appeals Improperly Created A Separate "Limited" Duty Owed By Mental Health Professionals To Third Parties.

Under Michigan law, the only duty owed by a mental health professional to warn or protect a non-patient third party from risks posed by the patient, is that set forth in MCL 330.1946. The Court of Appeals erred in creating a separate "limited" duty owed to plaintiffs by their daughter's counselor, Kathryn Salmi, beyond the duty established by the Legislature in MCL 330.1946.

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MCL 330.1946 sets forth, and also explicitly limits, the duty owed by a mental health professional to non-patient third parties arising out of a relationship between a patient and a mental health professional, providing, in relevant part:

> (1) If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). ***Except as provided in this section, a mental health professional does not have a duty*** *to warn a third person of a threat as described in this subsection or* ***to protect the third person****.*
>
> (2) A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:
>
> (a) Hospitalizes the patient or initiates proceedings to hospitalize the patient under chapter 4 or 4a.
>
> (b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.
>
> * * *
>
> (5) This section does not affect a duty a mental health professional may have under any other section of law. [Emphasis added].

In *Swan v Wedgwood Christian Youth & Family Services, Inc*, 230 Mich App 190, 195; 583 NW2d 719 (1998), the Court of Appeals held that the only duty owed under Michigan law by a mental health practitioner to warn or protect a non-patient third party is that created by, and limited by, the provisions of MCL 330.1946. The Court further held that a third party may not rely on allegations of negligence in the care of a nonparty patient, because the duty to provide proper medical or psychiatric care is owed only to the patient.

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Swan arose out of the killing of Harry Swan by his girlfriend's son, LaPalm. LaPalm had been transferred to defendant's facility, Wedgwood, a "secure residential program" that specialized in adolescents who had serious emotional or behavioral problems. While on leave from that facility, LaPalm murdered plaintiff's decedent.

Plaintiff, the personal representative of the decedent's estate, subsequently brought a civil action claiming that defendant breached a duty to use reasonable care in the admission, treatment, and supervision of LaPalm. This was alleged to consist of sending LaPalm home on an unsupervised visit, failing to take appropriate steps to insure the provision of an adequate amount of prescription medication for the visit, and failing to take adequate steps to ensure that LaPalm would take the prescribed medication. *Swan, supra*.

The Court in *Swan* held that there was no duty owed by a psychiatrist under Michigan law, other than that outlined in MCL 330.1946. First, the Court held that the common law allegations of negligent psychiatric care were premised on a duty owed not to plaintiff's decedent, but to the patient, and that the non-patient plaintiff could not claim the benefit of any alleged breach of duty to the patient:

> Plaintiff further argues that the statute does not apply in the present case because plaintiff's claim is not based upon a failure to warn but upon defendant's negligence in treating LaPalm. Plaintiff notes correctly that the type of claims it asserts are often brought together with a failure to warn claim, but they are separate questions. See *Paul v Plymouth General Hosp*, 160 Mich App 537, 541-542; 408 NW2d 492 (1987). However, plaintiff's argument fails because to the extent that he alleges a breach of duties on the part of defendant, those duties were owed to LaPalm and not to the decedent, as the circuit court correctly noted. [*Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 199; 583 NW2d 719 (1998)(emphasis added)].

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The Court in *Swan* then reasoned that plaintiff's effort to impose a common law duty to provide psychiatric care to a nonparty patient in favor of a non-patient third party also was negated by the last sentence of MCL 330.1946(1):

> Moreover, plaintiff's argument ignores the last sentence of MCL 330.1946(1); MSA 14.800(946)(1), which provides, "Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person." (Emphasis added.) We believe that this language is unambiguous and clearly limits the duty a mental health professional owes to third persons to the duty to warn identifiable third persons "as provided in this section. …" Plaintiff cannot claim the benefit of any alleged breach of duty to LaPalm, and the statute plainly provides that defendant did not owe a duty to the decedent. [*Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 199; 583 NW2d 719 (1998)].

In so holding, the Court in *Swan* examined the history of a psychiatrist's alleged duty to warn a third person. While noting that in "the landmark case on a psychiatrist's duty to third persons, *Tarasoff v Regents of Univ of California*, 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 (1976), the California Supreme Court held that a psychiatrist owes a duty to use reasonable care to protect persons endangered by his patient," the Court in *Swan* observed that Michigan Supreme Court had not yet decided whether to recognize a "*Tarasoff*"-like duty as a matter of Michigan common law before the Legislature enacted MCL 330.1946:

> In *Davis v Lhim*, 124 Mich App 291, 301; 335 NW2d 481 (1983), this Court adopted the *Tarasoff* reasoning and held that a psychiatrist owes a duty of reasonable care to a person who is foreseeably endangered by his patient. However, the Supreme Court reversed this decision on other grounds in *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988), and the Court found that on the basis of its holding it did not need to decide whether a duty to warn should be imposed upon mental health professionals. In 1989, the Michigan Legislature sought to codify the holding set forth in *Tarasoff* in a "duty to warn" statute, [MCL 330.1946]. [*Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 196; 583 NW2d 719 (1998)].

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The Court in *Swan* also examined the legislative history of the statute, which reflected an intent to limit the scope of a claim against a psychiatrist for failure to warn or protect a non-patient:

> Among the legislative purposes in enacting the statute in 1989 was limiting the liability of mental health practitioners. *Id*., citing House Legislative Analysis, HB 4237, July 11, 1989. In response to cases in which the common-law duty to warn had been extended to unnamed third parties and even to property, the statute limited a mental health practitioner's duty to third parties to the duty provided in the statute. *Id*. at 418-419. It is apparent from the language of the statute and its legislative history that it is intended to protect only those readily identifiable individuals against whom a threat of physical violence is made. *Id*. at 419. [*Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 197; 583 NW2d 719 (1998)].

Given the holding of the Court in *Swan* as to the duties owed by a mental health professional to non-patient third parties, it is clear that the Court of Appeals erred in holding that plaintiffs had stated a viable common law claim for breach of duty by Ms. Salmi in failing to protect them from allegations of sexual abuse.

First, as a matter of common law, Ms. Salmi owed no direct duty to non-patient plaintiffs to provide non-negligent mental health care to their daughter, Ms. Salmi's patient. As declared by the Court in *Swan*, with respect to a similar allegation based "defendant's negligence in treating" the patient, this argument "fails because to the extent that he alleges a breach of duties on the part of defendant, those duties were owed to [the patient] and not to the decedent." *Swan, supra*, 199.

Accordingly, plaintiffs' allegations that Ms. Salmi breached the applicable standard of care in failing to "properly diagnose and treat K" and implementing improper therapy techniques when treating "K" (complaint, ¶ 27(a)-(c), (f), Apx 36a) are not viable under the common law, regardless of MCL 330.1946. "Plaintiff [a non-patient] cannot claim the benefit of any alleged breach of duty to the patient." *Swan, supra*.

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Second, to the extent that plaintiffs are alleging a failure to protect them from false allegations of sexual abuse, such a claim either is not cognizable as a matter of common law, or is foreclosed by MCL 330.1946. Plaintiffs allege that Ms. Salmi was negligent in failing to disclose to "K," and to them while "K" was still a minor, "that viable alternative forms of treatment were available" as well as "the benefits and risks of the treatments used" by Ms. Salmi (complaint, ¶ 27(d)-(e), Apx 36a). There is certainly no support in the common law for such a duty to provide information about a patient to a third party. Indeed, imposition of such a duty would be inconsistent with the mental health privileges and physician patient privilege, which prohibits disclosure of patient information. See MCL 333.18117; MCL 330.1750; MCL 600.2157; *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 29-39; 594 NW2d 455 (1999).

There can be no duty to provide information to a third party about a patient that has been received by a mental health professional in the course of providing mental health treatment, other than that created by the Legislature as an implicit exception to the applicable privilege statutes. Such a duty to disclose patient information, or information obtained in the course of providing mental health treatment to a patient, arises only where the "patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient has the apparent intent and ability to carry out that threat in the foreseeable future. . ." MCL 330.1946. The allegations set forth in plaintiffs' complaint do not fall within the statute[4].

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[4] This Court's decision in *Dawe v Dr Reuven Bar-Levav & Assocs, PC*, 485 Mich 20; 780 NW2d 272 (2010) does not alter this analysis. In *Dawe*, this Court addressed MCL

330.1946, but only in the context of a common law duty owed to a patient, not a non-patient third party. *Dawe* has no application here where the plaintiffs are third parties, and assert not a common law medical malpractice action on their own behalf arising out of the care and treatment provided to them by Ms. Salmi, but a claim based on a mental health professional's failure to provide information about, or properly treat a patient, which is not recognized at common law, *Swan, supra*, and/or is directly within the scope, and limitations, of MCL 330.1946.

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C. The Existence Of The Duty Of Confidentiality Owed By The Counselor To The Client, And The Client's Concomitant Right To Confidentiality, Also Weigh Against Extending The Duty Of Care To Non-Patient Third Parties As A Matter Of Public Policy; Such An Extension Should Be For The Legislature.

Furthermore, the existence of the duty of confidentiality owed by the counselor to the client, and the client's concomitant right to confidentiality, also weigh against the finding of a duty in favor of non-patient third parties as a matter of public policy. Such an extension of the duty of care to non-patient third parties should be left for the Legislature.

According to the Court of Appeals, if the mental health professional "utilizes inappropriate treatment techniques or inappropriately applies otherwise proper techniques, which cause the patient to have a false memory of sexual abuse by a parent, the mental health professional may be liable to the patient's parents for the harms occasioned by the false memories." *Roberts v Salmi*, 308 Mich App at 629. In order to establish a claim for breach of this duty, the Court held that a plaintiff must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of techniques, that the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents' damages. *Id*.

The difficulty with the Court's holding is that both the Medical Records Access Act, MCL 333.26261, et seq, and the Health Insurance Portability and Accountability Act (HIPAA), 42 USC §§ 1320d, et seq, bar access to psychotherapy records. Additionally, both the counselor-client privilege set forth in MCL 333.18117, and the statute protecting privileged communication, MCL 330.1750, bar disclosure of confidential

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communications between plaintiffs' daughter and Kathryn Salmi, a licensed professional counselor.

As further discussed below, because of the counselor-client privilege, MCL 333.18117, Ms. Salmi cannot reveal confidential communications revealed to her by "K." As such, plaintiffs cannot obtain the information necessary to prove their case and Ms. Salmi cannot properly defend the present action because these communications are privileged and are subject to disclosure only under very specific circumstances, none of which are applicable here.

On the basis of these statutory protections, this Court should reject the imposition of a duty in favor of non-patient parents/third parties that intrudes upon the privacy rights of patients, particularly patients who are or believe themselves to be victims of sexual abuse, as a matter of public policy. Extension of such a duty of care to non-patient third parties should be left for the Legislature.

1. Both the Medical Records Access Act and HIPAA bar any right of access to psychotherapy records.

The Medical Records Access Act, MCL 333.26261 et seq, establishes the right of a patient or a patient's authorized representative to examine or obtain the patient's medical record. MCL 333.26265(1). "Medical record" is defined in MCL 333.26263(i) as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." Not only are plaintiffs not the patient or the patient's authorized representative, but the definition of "health care provider" specifically excludes a psychiatrist, psychologist, social worker or professional counselor who provides only mental health

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services. MCL 333.26263(e) ("Health care provider does not include a person who provides health care solely through the sale or dispensing of drugs or medical devices or a psychiatrist, psychologist, social worker, or professional counselor who provides only mental health services"). Therefore, there is no right of access to mental health records from a licensed professional counselor such as Ms. Salmi under Michigan law.

Similarly, the HIPAA Privacy Rule sets forth an individual's right of access to protected health information (PHI), grounds for denial of access to records, and the process for objecting to the denial of access, in 45 CFR 164.524. The Rule generally allows an individual to have access to medical records. The Rule specifically provides, however, that an individual does not have the right of access to psychotherapy notes. 45 CFR 164.524(a)(1)(i). Under this provision, the denial of access to psychotherapy records by a covered entity (such as a hospital or health care provider) is unreviewable[5]. 45 CFR 164.524(a)(2)(i). Therefore, there is no basis under Michigan or federal law for plaintiffs to obtain "K's" psychotherapy records from Ms. Salmi.

[5] Although 45 CFR 164.524 generally allows a parent to have access to the medical records pertaining to his or her minor child, as his or her minor child's "personal representative," when the access is not inconsistent with State or other law, there is an exception set forth in HIPAA's Privacy Rule that a provider may choose not to treat a parent as a "personal representative" when the provider reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child's "personal representative" could endanger the child, or is not in the child's best interest. 45 CFR 164.502(g)(5)(i) and (ii). Michigan has a similar provision set forth in MCL 333.26265(2)(e) for when disclosure of medical records is likely to have an adverse effect on the patient.

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2. Both the counselor-client privilege and the statute protecting privileged communications bar disclosure of confidential relations and communications between a client and a licensed professional counselor.

The relationship between a mental health professional and a patient receives particularly strong statutory protection in this State. MCL 333.18117 sets forth the counselor-client privilege, as follows:

> For the purposes of this part, the confidential relations and communications between a licensed professional counselor or a limited licensed counselor and a client of the licensed professional counselor or a limited licensed counselor are privileged communications, and this part does not require a privileged communication to be disclosed, except as otherwise provided by law. Confidential information may be disclosed only upon consent of the client, pursuant to section 16222 if the licensee reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. [emphasis supplied].

The counselor-client privilege statute clearly and unambiguously envisions that a licensed professional counselor is not required to disclose privileged communications, except as required by law or as otherwise allowed under the statute[6]. While the Legislature incorporated in §18117 three instances when a disclosure of confidential patient information may occur, none of the three exceptions set forth in the second sentence of §18117 apply here. Therefore, the confidential relations and communications between a licensed professional counselor such as Kathryn Salmi and

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[6] Examples of disclosures that are required by law would be a mental health professional's duty to disclose a patient's communicated threat of violence against a third person under MCL 330.1946, or the duty to report suspected child abuse under MCL 722.623.

her client are "privileged communications," and Ms. Salmi is not required to disclose the privileged communications "except as otherwise provided by law[7]."

Additionally, the admissibility of privileged communications is governed by MCL 330.1750, which provides that privileged communications "shall not be disclosed" in civil cases or proceedings, including even the fact that the patient has been examined or treated or undergone a diagnosis, unless the patient has waived the privilege. While the statute contains several exceptions to the waiver requirement in §1750(2), none of the circumstances allowing for admission of privileged communications set forth in §1750(2) apply here. Therefore, under §1750, the privileged communications between Ms. Salmi, a licensed professional counselor, and plaintiffs' daughter "K" cannot be disclosed in this civil action.

In *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 597; 766 NW2d 675 (2009), the Court of Appeals underscored the importance of the relationship between a therapist and his or her client, holding that the Legislature's purpose in enacting the psychologist-patient privilege statute, MCL 333.18237, was to protect the confidential nature of the psychologist-patient relationship, "a setting widely recognized as particularly sensitive and in which confidentiality is an essential ingredient of successful treatment."

The counselor-client privilege set forth in MCL 333.18117 is no less important in protecting the sensitive and confidential relationship between the counselor and the patient and should be construed in the same manner as the psychologist-patient

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[7] There is no contention by plaintiffs here that the disclosure of "K's" privileged information is otherwise required by law.

privilege. As in *In re Petition*, imposing a duty in favor of non-patient third parties and allowing a non-patient to bring a cause of action against another person's therapist would be contrary to this state's broad policy of protecting confidential information and the therapist-patient relationship.

See also *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 463; 608 NW2d 823 (2000) (holding that the physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of nonparty patient medical records); *Steiner v Bonanni,* 292 Mich App 265, 274; 807 NW2d 902 (2011) (recognizing that there are only limited exceptions to Michigan's general nondisclosure requirements and there is no Michigan rule for nonconsensual disclosure of nonparty patient information in judicial proceedings); *Dorris v Detroit Osteopathic Hospital Corp,* 460 Mich 26; 594 NW2d 455 (1999) (holding, in the consolidated *Gregory* case, that a hospital cannot be compelled to reveal the name of a nonparty patient who allegedly assaulted the plaintiff, even for purposes of identifying a potential defendant in a medical malpractice/tort action, where the patient has neither voluntarily nor impliedly waived the privilege, based upon "strong public policy reasons"; "[t]he concept of privilege . . . supersedes even the liberal discovery principles of this state").

There is no question that plaintiffs cannot obtain from the defendant the confidential communications between their daughter and Ms. Salmi, nor can Ms. Salmi disclose the content of these confidential communications or even the fact that she treated this patient, absent a waiver of the counselor-client privilege by their daughter. See *Doe v McKay*, 700 NE2d at 1024 (holding that, unless waived by the patient, the therapist's duty of confidentiality would restrict the therapist in the manner in which she

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could respond to the plaintiff's allegations). Plaintiffs here failed to come forward with an authorization for release of their daughter's records and it is clear from the allegations in the complaint that plaintiffs will not be able to provide such a release, given that their daughter has severed all ties with them and continues to make further complaints to police and in the community against plaintiffs based upon her allegations of severe physical and sexual abuse (complaint, ¶¶ 15, 19, 21, Apx 34a). Plaintiffs' inability to proceed with their case, and Ms. Salmi's inability to defend this action, due to the existence of the duty of confidentiality owed by the counselor to the client weighs against the finding of a duty in favor of non-patient third parties.

3. This Court should reject the imposition of a duty in favor of non-patient parents/third parties that intrudes upon the privacy rights of patients, particularly patients who are or believe themselves to be victims of sexual abuse, as a matter of public policy.

This Court should reject the imposition of a duty in favor of non-patient parents/third parties that intrudes upon the privacy rights of patients, particularly patients who are or believe themselves to be victims of sexual abuse, as a matter of public policy.

This Court has repeatedly rejected the imposition of a duty as a matter of public policy. See *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 501; 418 NW2d 381 (1988) (holding that a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties based in part on the public interest in imposing such a duty); *Buczkowski v McKay*, 441 Mich 96, 108; 490 NW2d 330 (1992) (holding that, as a matter of policy, a retailer did not have a legal duty to protect a member of the general public from the criminal acts of the defendant); *Hill v Sears, Roebuck & Co*, 492 Mich 651, 669-670; 822 NW2d 190 (2012)

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(holding that an appliance installer's duty does not include the duty to taken any action with respect to an uncapped gas line, holding that the social benefits of imposing a duty do not outweigh the social costs).

As recognized by the majority of courts in other jurisdictions, the recognition of a duty of care to non-patient third parties who might foreseeably be harmed by a mental health professional's treatment of his or her patient is against public policy. See *Zamstein v Marvasti*, *supra*, 692 A2d at 787 (holding that the imposition of a duty on a mental health professional to the person suspected of committing the abuse to exercise reasonable care in the performance of an abuse evaluation would discourage such individuals from performing sexual abuse evaluations of children out of fear of liability, which would "necessarily run contrary to the state's policy of encouraging the reporting and investigation of suspected child abuse"); *Althaus v Cohen*, *supra*, 756 A2d at 1171 (holding that "the societal interest in encouraging treatment of child abuse victims and maintaining the trust and confidentiality within the therapist/patient relationship dictates against the imposition of a duty of care beyond that owed to the patient"). These cases rightly hold that the recognition of such a duty of care is substantially outweighed by these policy considerations – the importance of the availability of treatment for victims of sexual abuse, of allowing and encouraging therapists to evaluate and treat their patients without fear of potential liability to suspected abusers, and of maintaining confidentiality of communications between the therapist and the patient.

In the present matter, "K" has not recanted her allegations of abuse against her parents. In fact, plaintiffs allege in the complaint that "K" has severed all ties with her parents and continues to assert that the abuse occurred (complaint, ¶¶ 12-16, 19, 21,

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Apx 34a; motion for protective order, ¶ 6, p 2, Apx 44a). If this suit were allowed to go forward, this Court would be subjecting "K" to questioning in an adversarial proceeding (either at deposition or at trial) by those she accuses of severe physical and sexual abuse. It should not be the policy of this State to allow this to occur, even in litigation where the Court must assume as true the facts as alleged in the complaint that the defendant is responsible for implanting "false" memories of abuse.

The analysis of duties owed by the defendant must proceed from the assumption that the abuse occurred or, if nothing else, that "K" "adamantly believes" that the abuse occurred (complaint, ¶ 12, Apx 34a). Plaintiffs, as the alleged abusers, whether wrongly accused or not, seek to have a duty run to them at the expense of the therapeutic relationship beneficial to "K" and "K's" rights of confidentiality. Given this State's broad policy of protecting victims of physical and sexual abuse, see MCL 722.621 et seq, the need to protect "K" from even the possibility of further psychological trauma and abuse by her alleged abusers, including abuse in the context of litigation, should override any recognition of a right of the accused abuser.

The potential for litigation abuse is illustrated by the arguments set forth by the plaintiffs in their attempt to obtain discovery in this matter, including the attempted scheduling of the deposition of "K." In support of the emergency motion to quash the deposition of "K", defendant submitted two letters from "K's" treating therapists, wherein "K's" treaters indicated that the deposition was not in the best interest of their patient and could result in psychological trauma (5/2/12 and 5/3/12 letters). Defense counsel also submitted that she had spoken with "K" and "K" was "extremely agitated" about having to appear for a deposition, anticipated that the deposition would be "traumatic,"

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and she "absolutely abhors the thought that she might be forced to share any personal information with her birth parents" (motion for protective order, ¶ 6, p 2). Despite having this information, plaintiffs' counsel argued at the hearing on defendant's motion for summary disposition that it was unclear whether "K" was asserting the privilege[8], and then delineated the methods that could be used to obtain information regarding "K's" privileged medical information even if she were to assert the privilege, as follows:

> [BY PLAINTIFFS' COUNSEL:] So even – I'm getting ahead of myself here, but we don't know that she's going to assert the privilege. There's nothing on the record establishing that.
>
> You know, it could be as simple as bring her in, can you tell us about your therapy with Ms. Salmi?
>
> No, it's privileged, I'm not talking about it.
>
> Then we go into discussing these other – Well, did you talk to anybody about it, have you ever disclosed it to anybody? You know, we can send investigators out to talk to friends and people that she knows, to find out if she ever talked to or disclosed anything regarding her therapy.
>
> Once that disclosure happens, the privilege disappears. [TR 1/10/13, p 24 (emphasis added)].

This type of systematic harassment advocated by plaintiffs' counsel, utilized by the very people "K" accuses of physical and sexual abuse and under the pretext of conducting "discovery" during litigation, should not be sanctioned by this Court.

This Court therefore should decline to recognize a duty of care to the plaintiffs, the alleged third-party abusers, as against public policy.

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[8] As set forth below, it is defendant's position that "K" asserted the privilege when she indicated to defense counsel that she "absolutely abhors the thought that she might be forced to share any personal information with her birth parents," which prompted defense counsel to file an emergency motion for protective order to prevent plaintiffs from taking "K's" deposition in this matter (motion for protective order, ¶ 6, p 2). The trial court thereafter granted defendant's motion, holding that "K's" deposition "is adjourned until further order of the Court" (5/3/12 order).

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4. Given that the recognition of plaintiffs' cause of action has such significant public policy implications, recognition of this cause of action is, at a minimum, for the Legislature of this state.

Given that the recognition of plaintiffs' cause of action has such significant public policy implications – allowing plaintiffs to impose upon the psychotherapeutic relationship their daughter had with her counselor, thus violating the patient's privacy rights in the process – defendant respectfully submits that recognition of this cause of action is, at a minimum, for the Legislature of this state. In *Henry v Dow Chemical Co*, 473 Mich 63, 68-69; 701 NW2d 684 (2005), this Court rejected plaintiff's medical monitoring claim on the basis that the court lacked "sufficient information to assess intelligently and fully the potential consequences of recognizing" such a claim, and deferring this case "to the people's representatives in the Legislature, who are better suited to undertake the complex task of balancing the competing societal interests at stake." This Court specifically recognized in *Henry* that Legislatures are in the best position to consider difficult public policy issues, as follows:

> Legislatures are in the best position to consider far-reaching and complex public policy issues. First, they can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made. Second, legislatures make law prospectively, which gives the public fair notice about significant legal changes. . . . Third, they must be sensitive to the will of the public; if they are not, the public can vote them out of office. In our democratic system, if far-reaching public policy decisions are to be made, the public should have the opportunity to evaluate those changes and express their agreement or disagreement in the voting booth.
>
> Courts, on the other hand, are best suited to make incremental changes over time. Judges decide cases one at a time. Their information-gathering is limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests. Second, judges "make law" retroactively. This creates notice and fairness problems. Third, there is no "public light" placed on judicial lawmaking. Judges in many states are appointed, not elected.

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> The public has no voice in and must accept judicial will. When judges are elected, the public is generally unaware of the legal opinions the judges have written or the impact of those opinions on society. [*Henry*, 473 Mich at 92, n 24, citing Schwartz & Lorber, *State Farm v Avery: State court regulation through litigation has gone too far*, 33 Conn L R 1215, 1219-1220 (2001).]

Here, the Court of Appeals created a new cause of action in favor of third parties to a psychotherapeutic relationship, beyond that which already exists in MCL 330.1946 and which, as other courts have recognized, will necessarily compromise the psychotherapeutic relationship. *Doe v McKay*, *supra*; *Trear v Sills*, *supra*. Defendant respectfully submits that the Court of Appeals had no foundation for its bald assertion below that the recognition of a limited duty of care to third parties would not "unduly burden" a mental health professional's ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. *Roberts v Salmi*, 308 Mich App at 625. Certainly the courts of this state are not in the best position to make this determination. Rather, as this Court held in *Henry*, recognition of a previously unrecognized cause of action, having such significant public policy implications, should be left to the Legislature. See also *Sizemore v Smock*, 430 Mich 283, 299; 422 NW2d 666 (1988) (holding that, in light of the "variety of complex social policy considerations," the determination "of whether this state should further extend a negligent tortfeasor's liability for consortium damages should be deferred to legislative action rather than being resolved by judicial fiat.").

This is particularly true where a tort remedy is available to a patient who believes that he or she has been the victim of professional negligence. Although the Court of Appeals below held that the failure to recognize a duty to non-patient third parties "might encourage the continued use of questionable therapeutic techniques on uninformed

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patients," *Roberts v Salmi*, 308 Mich App at 626, defendant submits that the use of competent professional judgment by mental health professionals already is encouraged by allowing a medical malpractice action by the patient, and there is no need to extend the duty to third parties in order to accomplish the goal of securing appropriate patient care. The Court's creation of a theory of liability on behalf of the non-patient parents is an unwarranted expansion of liability. Defendant respectfully submits that the Court of Appeals simply had no basis for its assertion that the extension of a duty to third parties will reduce the likelihood that negligent therapy methods will be used. See *Sizemore v Smock*, *supra*, 430 Mich at 293-294 (declining to extend a tortfeasor's liability to compensate a third party for injury to a child, noting that the "efficacy of such an award to either deter negligent conduct or adequately redress the loss suffered is highly questionable. To the extent that the system of tort liability is designed to make one more socially responsible vis-à-vis their relationship with others, it is unlikely that any secondary liability imposed beyond the liability exposure to the primary victim of an injury will do anything to further that objective.").

Additionally, a patient who brings suit upon the belief that his or her counselor committed malpractice would place his or her own treatment at issue, thus waiving the statutory privilege protecting the counselor-client communications. MCR 2.314; see also MCL 600.2912f. Under those circumstances, the confidentiality concerns set forth above would no longer restrict the counselor in defending the action.

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D. The Court Of Appeals' Recognition Of A "Limited" Duty Also Is Inconsistent With The Legal Principle That Parents Have No Independent Claim For Their Own Damages For Their Own Emotional Distress Arising Out Of Care And Treatment Provided To Their Child.

The Court of Appeals' recognition of a "limited" duty on behalf of non-patient third parties also is inconsistent with the legal principle that parents have no independent claim for their own damages for their own emotional distress arising out of care and treatment provided to their children.

Plaintiffs' claims are based on the alleged improper treatment of a third person, their daughter, by licensed professional counselor Kathryn Salmi. Parents of children who are injured by allegedly improper medical treatment have no independent claim for their own emotional distress or loss of consortium, other than through a "bystander" claim for negligent infliction of emotional distress (which plaintiffs did not plead and otherwise cannot establish here). The Court of Appeals therefore improperly created a tort claim for damages by parents that otherwise are not recoverable.

It is well established that, generally, family members of patients do not have a claim for damages for allegedly improper medical care and treatment provided to a family member, even when the family member is directly involved in the treatment process. See *Malik v Wm Beaumont Hospital,* 168 Mich App 159, 168-169; 423 NW2d 920 (1988) (no claim by brother who had undergone surgery to donate kidney to sister for negligence in the performance of surgery on the sister; claim is essentially one for loss of consortium, not available to a sibling); *Young v Oakland General,* 175 Mich App 132; 437 NW2d 321 (1989) (grandson of the decedent has no claim for intentional infliction of emotional distress based on giving of blood transfusion to decedent, a

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Jehovah's Witness; only duty to properly obtain consent runs to the patient, not to family members).

Plaintiffs seek damages for their own emotional distress and lost wages and medical expenses as a result of allegedly negligent treatment rendered to their daughter. Under Michigan law, however, a claim by a parent for emotional injury as a result of a tort committed upon a child is a claim for loss of consortium that is barred as a matter of law. *Malik, supra* (claim of emotional distress by brother regarding loss of kidney as a result of malpractice upon sister is properly characterized as a claim of loss of consortium, and not available to a sibling)*; Sizemore v Smock*, *supra* (a parent has no claim for emotional distress, i.e. loss of consortium, for injury to child).

E. Additionally, The Court Of Appeals' Recognition Of A "Limited" Duty Effectively Revives A Parent's Claim For "Alienation Of Affection," Which Has Been Statutorily Abolished In This State.

Additionally, the Court of Appeals' recognition of a "limited" duty to non-patient third parties effectively revives a parent's claim for "alienation of affection," which has been statutorily abolished by MCL 600.2901.

MCL 600.2901 provides:

The following causes of action are abolished:

(1) The alienation of the affections of any person, animal, or thing, capable of feeling affection, whatsoever;

"Alienation" is defined as "a withdrawing or separation of a person or his affections from an object or position of former attachment." Webster's New Collegiate Dictionary.

The Court of Appeals asserted below in conclusory fashion that plaintiffs' claim to recover for their own injuries caused by Ms. Salmi's alleged malpractice is not barred by

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MCL 600.2901. *Roberts v Salmi*, 308 Mich App at 632-633. The Court held that merely because plaintiffs' claim involves the alienation of "K's" affections "to some extent," this does not transform plaintiffs' claim from one of malpractice. *Id*. The Court's holding, however, is contradictory to the broad language of MCL 600.2901 and case law construing the statute.

In *Nicholson v Han*, 12 Mich App 35; 162 NW2d 313 (1968), the plaintiff and his wife consulted the defendant, a physician, in his role as a psychiatrist and marriage counselor. The marital situation deteriorated, and the wife began a relationship with the physician. Plaintiff husband brought an action charging the defendant physician with using the doctor-patient relationship to seduce the wife under theories of breach of contract, malpractice, assault and battery, negligence and fraud. The plaintiff claimed that he suffered the loss of his spouse's society, services, and comfort by means of unlawful or tortious conduct of the defendant. *Id.* at 43. The trial court granted summary disposition on all counts, and the Court of Appeals affirmed, finding that regardless of the label applied by plaintiff to his claim, the essence of the claim was one for alienation of affections, and abrogated by law. *Id.* at 43-44.

The statutory bar extends to claims where tortious interference with the parent/child relationship is claimed. *Miller v Kretschmer*, 374 Mich 459; 132 NW2d 141 (1965). In *Miller,* this Court rejected the assertion that the statute was intended to abolish only the traditional cause of action for alienation of affections recognized at common law. The *Miller* Court applied the statute to hold that no claim existed in favor of a minor against a person who wrongfully induced one of her parents to desert her and leave the family home. This Court declared:

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> The re-enactment of the above section, as modified by the legislature, has unquestionably spelled out a legislative decision to abolish all actions for alienation of affections, including those of minor children against a person who has induced one of their parents to leave the family home. [*Id.* at 461 (emphasis added)].

The Court in *Miller* reiterated that the statute extends to claims involving interference in the child/parent relationship in *Berger v Weber*, 411 Mich 1, 15; 303 NW2d 424 (1981). In *Berger*, this Court took up the issue of when a child might recover for the loss of society and companionship of a negligently injured parent. The *Berger* Court acknowledged that Michigan recognizes several similar claims (e.g. spouse for injury to spouse), but had not recognized a cause of action in favor of a child against the tortfeasor who injured the parent. In concluding that such a cause of action is cognizable in Michigan, this Court compared the statutory abrogation of a claim for alienation of affection:

> Another objection to the child's cause of action raised by defendants-appellants is that it would be anomalous to allow a child to recover for negligent invasion of his family interest when he is specifically prohibited from recovery for intentional, direct invasion of his family interest under MCL 600.2901(1); MSA 27A.2901(1), which bars suits for alienation of affections.
>
> We do not regard this as anomalous. One may recover for negligent injury or death of a spouse and a child may recover for the negligent death of a parent even though both be barred from recovery for the intentional, direct invasion of the family interest occasioned by alienation of affection. *Berger* at 15 (emphasis added).

This Court thus acknowledged that the statutory abrogation of a claim for "alienation of affections" extends to cases like the instant one, where the plaintiff parents claim a direct invasion of the family interest by a tortfeasor. Plaintiffs' allegations here fall squarely within the intended scope of the statutory bar. Plaintiffs maintain that Ms. Salmi directly interfered with their relationship with their daughter.

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Therefore, regardless of the label applied by plaintiffs to their claim, plaintiffs' claim falls within the definition of "alienation" and is not a cognizable claim under Michigan law. Plaintiffs' cause of action has been abolished in Michigan, and the trial court therefore properly dismissed plaintiffs' claim.

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RELIEF REQUESTED

WHEREFORE defendant respectfully requests that this Honorable Court reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition.

Respectfully submitted,

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Dated: December 2, 2015

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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

LALE ROBERTS and JOAN ROBERTS,

Plaintiffs-Appellees,

vs.

KATHRYN SALMI, L.P.C., an individual, d/b/a SALMI CHRISTIAN COUNSELING,

Defendant-Appellant.
_____/

Supreme Court No.: 150919

Court of Appeals No.: 316068

Houghton County Circuit Court
Case No.: 12-15075-NH

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Zachary C. Kemp, Esq. (zach@thekemplawfirm.com).

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